

***United States Court of Appeals
for the Second Circuit***



AMICUS BRIEF

No. 74-2191 B

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

COMMUNICATION WORKERS OF AMERICA, AFL-CIO, *et al.*,
Appellants,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
LONG LINES DEPARTMENT, *Appellee.*

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR THE INTERNATIONAL UNION OF
ELECTRICAL, RADIO AND MACHINE WORKERS,
AFL-CIO-CLC, UNITED ELECTRICAL, RADIO AND
MACHINE WORKERS OF AMERICA (UE), WOMEN'S
EQUITY ACTION LEAGUE AND HUMAN RIGHTS FOR
WOMEN INC., AS AMICI CURIAE

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INTEREST OF THE AMICI CURIAE¹

The International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, hereinafter called IUE, and the United Electrical, Radio and Machine Workers of America (UE) are international labor organizations composed of employees of manufacturers of electrical equipment.

¹ This brief is filed pursuant to Rule 29, Federal Rules of Appellate Procedure. Written consent of Appellants and Appellee has been obtained and filed with the Clerk of Court.

Approximately a third of the members of each the IUE and UE are female.

Almost a million women are employed in the electrical equipment manufacturing industry.² The median earnings in 1970 for the female in the industry who worked year round full time were between \$5,351 and \$5,645,³ which amounted to less than two-thirds of the comparable earnings of males in the industry.⁴

In their efforts over the years to overcome the low pay of the women employees in the industry, the IUE and the UE have come to realize the effect on wages of employer practices respecting pregnancy. A manual used by General Electric Company a number of years ago in fixing wages expressly provided that, after assigning points to skill, effort and responsibility without regard to the sex of the employee performing the job, in setting the wage rate "[f]or female operators, the value shall be two-thirds of the value for adult male workers."⁵ The manual of the Westinghouse Electric Company similarly provided for placing women on a lower pay curve.⁶ The reason assigned was the "more transient character of the service" of the women in industry, the allegedly greater cost of employing women and "general sociological factors."⁷

The transient character of women's employment in the electrical industry is largely the result of employer prac-

² U.S. Dept. of Labor, Bureau Labor Statistics, Rep. 417, Selected Earnings and Demographic Characteristics of Union Members, 1970 (GPO 1972), Table 2, pp. 7-8, shows union membership among females employed in the electrical equipment manufacturing industry as 266,000 which represents 27% of females employed in the industry.

³ *Id.*, Table 7, p. 18.

⁴ *Id.*, Table 7, p. 16.

⁵ *General Electric Co.*, 28 War Lab. Rep. 666, 681 (1945).

⁶ *Id.*, at p. 680.

⁷ *Id.*, at 680-681, 685-686.

tices of terminating women when they become pregnant, thus depriving them of seniority and pension rights and requiring them to look for jobs as new employees when they seek to return to work following childbirth and to start anew to build seniority and pensions. For employees disabled by other conditions, the right to disability benefits is the device which operates to assure continuity of employment.⁸ An employer who is obligated to pay disability benefits, has a monetary incentive in finding less strenuous work for a partially disabled employee rather than having him at home drawing benefits.⁹ Such an employer is also anxious not to have the employee's absence on account of disability extend longer than medically certified as necessary. The regular payment and receipt of benefits makes both aware the employment relation is continuing.

The allegedly greater cost of employing women, as justifying paying them lower wages, has consistently been explained by employers as based on costs connected with maternity.¹⁰

⁸ Lester P. Schoene, representing the Committee of the Railway Labor Executives' Association, Hearings on H.R. 1362, 79th Cong., 1st Sess., Before the House Committee on Interstate and Foreign Commerce, 79th Cong., 1st Sess., at 1112.

⁹ The United States Civil Service Regulations provide for the use of sick leave for absence due to childbirth or a disability of pregnancy and provide for reassignment of pregnant employees to suitable work if the job regularly held is too difficult or dangerous, *Federal Personnel Manual* (Rev. July 1969), Subchapter 13, Maternity Leave 630-29, Sec. 13-1 and 13-4g (4). For practices in industry generally, see *Gilbert v. General Electric Co.*, 375 F.Supp. 367, 374, 376 (E.D.Va. 1974); Prentice-Hall Survey: Maternity Leave Policies Due For A Change, Report Bull. No. 25, June 6, 1972, p. 459; Prentice-Hall Survey: Maternity Leave, 12/18/73, p. 457.

¹⁰ *United Screw and Bolt Co.*, 17 War Lab. Rep. 232, 235 (1944); Hearings on H.R. 3861, 88th Cong., 1st Sess., Before the Special Subcommittee on Labor, 88th Cong., 1st Sess., pp. 139, 194, 243, 258-259; Hearings on S. 882 and S. 910, 88th Cong., 1st Sess., Before The Senate Subcommittee on Labor of the Committee on Labor & Public Welfare, 88th Cong., 1st Sess., April 3, 1963, pp. 142, 145; 109 Cong. Rec. 9205.

Because of the key role of employer practices respecting pregnancy, the IUE and the UE have engaged in efforts through collective bargaining,¹¹ processing of grievances on behalf of pregnant women to arbitration,¹² and resort to administrative and judicial proceedings¹³ to protect female employees from discrimination because of pregnancy.

Subsequent to EEOC Decision No. 71-1474, CCH-EEOC Dec. Par. 6221 (1971), holding that failure to treat disabilities arising out of pregnancy the same as all other disabilities for purposes of sick pay, constituted discrimination because of sex, the IUE and UE undertook vigorous campaigns to persuade the employers with whom they bargain to conform to that decision.

As collective bargaining agent, the IUE and UE have during the past two years been engaged in negotiations with approximately 500 employers for the purpose of securing for female employees the right to all the same benefits as other disabled employees for periods of disability due to childbirth or the complications of pregnancy.

¹¹ A reference to the IUE's efforts in 1960 to negotiate respecting pregnancy benefits appears in *NLRB v. General Electric Co.*, 418 F.2d 736, 750 (1969), cert. denied 397 U.S. 965 (1970), where this Court quoted as illustrative of GE's bad faith bargaining a colloquy at the bargaining table in which GE refused to furnish IUE figures as to the cost of maternity benefits for the asserted reason that GE spokesmen "talk level of benefits, not costs."

¹² *IUE v. Westinghouse*, 55 L.R.R.M. 2953 (U.S.D.C., S.D.N.Y. 1964), which enforced arbitration which resulted in the award in *Westinghouse Electric Corp.*, 45 L.A. 621 (P. Hebert, Arbitrator, 1965). Most arbitrators hold that disabilities resulting from pregnancy have to be treated the same as other disabilities unless the employer has expressly secured a provision for a different treatment. E.g., *Washington Publishers Ass'n.*, 39 L.A. 159 (Judge Nathan Cayton, Arbitrator, 1962); *National Lead Co.*, 18 L.A. 52 (Arthur Lesser, Jr., Arbitrator, 1952), *Republic Steel Corp.*, 37 L.A. 367 (Joseph Stoshower, Arbitrator, 1961); *American Machine & Foundry Co.*, 38 L.A. 1085 (Wayne T. Geissinger, Arbitrator, 1962).

¹³ E.g., cases cited footnotes 8 and 9, *supra*.

With some employers, these negotiations have been completely successful.¹⁴ Still other employers have entered into standby agreements making retroactive to the date of the signing of the agreements of rights of employees with respect to sick pay for periods of absence due to childbirth or other pregnancy-related disability should the courts in cases involving other employers make a final resolution to the issue in favor of pregnant employees.

The lack of success as to other employers has resulted in the filing by IUE, UE, their affiliated locals or members of charges with the Equal Employment Opportunity Commission, hereinafter called EEOC, and state fair employment practice agencies and the filing of suits in the federal district courts, alleging that various policies and practices of employers in singling out pregnancy for special treatment constitutes unlawful sex discrimination in violation of Title VII or similar state law.

The IUE is a successful party plaintiff in *Gilbert v. General Electric Company*, 375 F.Supp. 367, 7 FEP Cases 796, 7 EPD ¶ 9282 (E.D. Va., 1974), now pending on appeal of the General Electric Company in the United States Court of Appeals for the Fourth Circuit (Case No. 74-1557), where the district court found that GE had discriminated against all of its female employees because of their sex in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, by refusing to pay sickness and accident benefits to employees absent from work due to childbirth or other pregnancy-related disability on the

¹⁴ E.g., the following employers have agreed to pay temporary disability benefits for pregnancy-related disabilities in the same amounts and for same duration as for other disabilities: plans with 26 weeks' maximum duration: Central Industries, Chandler, Ind.; Lawrenceville Industries, Lawrenceville, Ill.; TRW, Inc., Philadelphia, Pa.; plans with 13 weeks' maximum duration with weekly benefits as indicated: Airco Speer Carbon Graphite, St. Mary's, Pa. (\$55 but not in excess of 70% average weekly earnings); Chromalloy Corp., Midwest City, Okla. (\$60); Cooperative Services, Inc., Detroit, Mich. (\$70 to \$130); and ITT Electrical Optical Products Division, Roanoke, Va. (\$50).

same basis as such benefits were paid for absences due to other disabling conditions. Although the district court in the *Gilbert* case found that GE's "discriminatory attitude" towards women was "a motivating factor" in its policy of excluding absences resulting from pregnancy-related disabilities from the benefits of its temporary disability benefits plan (375 F.Supp. at 383), GE relies upon *Geduldig v. Aiello*, 94 S.Ct. 2485 (1974) as requiring a reversal.

The IUE is also a party plaintiff in two other cases now pending in the federal district courts and not yet decided, which present related issues: *Grogg v. General Motors Corp.*, U.S.D.C., S.D.N.Y., Case No. 73-Civ. 63, which presents the issue of whether the imposition by GM of a maximum period of six weeks on payment of temporary disability benefits during absences due to pregnancy-related disabilities when benefits are payable for up to 52 weeks where absences are due to other disabilities, the insistence on mandatory maternity leave and the exception of tubal ligations from an otherwise all inclusive medical and hospital insurance plan, violate Title VII; *Eberts v. Westinghouse Electric Corp.*, U.S.D.C., W.D. Pa., Civ. Act. No. CA-74-113, which presents, in addition to the failure to pay temporary disability benefits for absences due to pregnancy-related disabilities, the issues of whether discharging or coercing pregnant females to resign, refusing reinstatement following childbirth, cancelling their accrued seniority and pension credits, refusing to allow them accrual of seniority and pension credits, all contrary to the practice respecting other disabilities, violate Title VII.

The IUE has participated on behalf of complainants in the hearings and briefing of a number of cases pending before the New York State Division of Human Rights: *Avery v. General Railway Signal Corp.*, N.Y. State Division of Human Rights, Complaint Cases Nos. CS-27503-72, CS-26324-72 and *Franklin v. Stromber-Carlson Corp.*, Cases Nos. CS-27069-72, CS-27071-72, CS-27068-72, which

present issues as to whether the following constitute unlawful discrimination because of sex in violation of the New York State Human Rights Act, N.Y. Executive Law, Art. 15, Sec. 296: requiring a pregnant employee to go on unpaid leave during the latter months of pregnancy and remain on unpaid leave following childbirth without regard to ability to work; cancellation of Blue Cross and Blue Shield at the time employee goes on leave, depriving employee of coverage for prenatal care and delivery unless employee assumes payment of premiums although employer pays all premiums during periods of leave for other disability and covers prenatal and delivery expenses for wives of employees; no income maintenance for absences due to pregnancy-related disabilities or income maintenance for shorter periods than provided for other absences; *Kostelny v. Westinghouse Electric Corp.*, N.Y. State Division of Human Rights, Complaint Cases Nos. CS-28709-72 and CS-27927-72, involving loss of seniority and pension rights as well as failure to pay sickness and accident benefits in pregnancy-related absences.

From the foregoing, it is evident that the IUE and UE have an interest in the consideration by this Court of the instant brief which attempts to make available to this Court their extensive experience, research, and legal analysis of pregnancy discrimination as sex discrimination for purposes of Title VII.

Women's Equity Action League ("WEAL") is a nationwide membership organization comprised chiefly of business and professional women and men. It was established in 1968 in part to promote greater economic progress on the part of American women. WEAL has fought job discrimination against women by pressing for enforcement of existing anti-discrimination laws through litigation and other techniques, as well as by reappraising federal, state, and local laws and practices which limit women's employment opportunities. It has, for example, filed a brief as

amicus curiae before the Supreme Court in *Pittsburgh Press Company v. The Pittsburgh Commission on Human Relations, et al.*, 413 U.S. 376 (1973); *Cleveland Board of Education v. La Fleur* and *Cohen v. Chesterfield County School Board*, 414 U.S. 632 (1974); and *Geduldig v. Aiello*, 94 S.Ct. 2485 (1974). It has also participated as an amicus curiae before the district court and the Court of Appeals for the Fourth Circuit in *Gilbert v. General Electric Co.*, 375 F.Supp. 367 (E.D. Va. 1974) pending on appeal in the Fourth Circuit Case No. 74-1557, and before the Third Circuit in *Wetzel v. Liberty Mutual Insurance Co.*, Third Circuit Case No. 74-1233.

Human Rights for Women, Inc. ("HRW") is a non-profit tax-exempt organization which was incorporated in the District of Columbia in December 1968. One of its purposes is to provide legal assistance without charge to women seeking to invoke their rights under the Constitution and statutes of the United States, particularly Title VII of the Civil Rights Act of 1964, relating to equal employment opportunity. A major portion of HRW's efforts and financial resources have been devoted to furnishing free legal counsel for women in Title VII cases. It participated together with WEAL in filing briefs as amicus curiae in the *Gilbert* case in the district court and the Fourth Circuit and in *Wetzel* in the Third Circuit.

The issue in this case, whether Title VII of the 1964 Civil Rights Act mandates that discrimination because of pregnancy be considered unlawful discrimination because of sex, is one which is of great concern to amici. The reliance by employers on potential pregnancy or actual pregnancy has played a major role in denying women equal employment opportunities, and as a result their ability to reach full potential as productive members of the work force has been impaired. Title VII was intended to redress this problem. The exclusion of pregnancy-related disabilities from AT&T's sickness and accident plan not

only deprives females of a benefit which is available for every other disability suffered by men, but exemplifies those practices which discourage women from becoming first class employees on an equal plane with men.

ARGUMENT

I

The EEOC Guidelines On Discrimination Because of Sex constitute a determination that in the employment context, and having regard to the purposes for which employers pay temporary disability benefits, the refusal of an employer to pay the same benefits during absences necessitated by childbirth as are paid during absences because of other disabilities, constitutes invidious discrimination because of sex

In 1972, the EEOC issued guidelines dealing with a wide variety of employment policies relating to pregnancy and childbirth.¹⁵ These guidelines are based on EEOC's construction of Title VII as embodying the Congressional intent that employers must make such reasonable accommodations to pregnancy as will achieve as much equality between male and female employees as is reasonably possible. The EEOC First Annual Report to Congress for Fiscal Year 1965-1966, p. 40 states:

"The prohibition against sex discrimination is especially difficult to apply with respect to the female employees who become pregnant. In all other questions involving sex discrimination, the underlying principle is the essential equality of treatment for male and female employees. The pregnant female, however, has no analogous male counterpart and pregnancy necessarily must be treated uniquely. The Commission decided that to carry out the Congressional policy of providing truly equal employment opportunities, including career opportunities for

¹⁵ 29 CFR 1604.10. It should be noted that EEOC guidelines are entitled to "great deference". *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

women, policies would have to be devised which afforded female employees reasonable job protection during periods of pregnancy."

The guidelines group under five different legal categories, each the subject of a different section or subsection, the different types of discrimination in employment because of pregnancy. As to each of these legal categories, by examining the annual reports of the EEOC and its decisions, it is possible to trace the cases and different solutions which EEOC tried before deciding to embody in these guidelines a culmination of the experience which EEOC has gained in its processing of cases during the preceding seven years.

First, under the heading of "Sex as a bona fide occupational qualification," all state laws regulating work during pregnancy are declared superseded by Title VII.¹⁶

Second, under the heading of "Fringe benefits," it is declared unlawful discrimination for an employer to pay the hospital and doctor bills incurred by wives of male employees in connection with pregnancy and childbirth but refuse to pay such bills when female employees have

¹⁶ "Sec. 1604.2 *Sex as a bona fide occupational qualification.*

"* * *

"(b) Effect of sex-oriented state employment legislation.

"(1) Many States have enacted laws or promulgated administrative regulations with respect to the employment of females. Among these laws are those which prohibit or limit the employment of females, e.g., the employment of females * * * for certain periods of time before and after childbirth. The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and, therefore, discriminate on the basis of sex. The Commission has concluded that such laws and regulations conflict with and are superseded by Title VII of the Civil Rights Act of 1964. Accordingly, such laws will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception."

For the repeal by Connecticut of her laws limiting the employment of women during the four weeks preceding or the four weeks following childbirth see Conn. S.B. 62, L. 1972, effective April 17, 1972.

babies.¹⁷ This codified earlier decisions by EEOC finding reasonable cause to believe that the employer violated Title VII by failing to extend to its female employees maternity-insurance coverage provided for wives of male employees. E.g., EEOC Decision No. 70495, 2 FEP Cases 499 (January 29, 1970). That a substantial number of employers followed this practice see Prentice-Hall Survey: Maternity Leave Policies Due for a Change, Report Bulletin 25, June 6, 1972, p. 459.

Third, under the heading "Employment policies relating to pregnancy and childbirth," it is declared that a policy of not hiring pregnant employees is prima facie violation of Title VII.¹⁸

Fourth, under the same heading, it is provided that adequate leave must be provided to employees disabled by pregnancy or childbirth so that women do not lose their jobs by being absent because so disabled, even if there is no similar leave policy for other disabling conditions, if the absence of such leave has a disparate sex effect and is not justified by business necessity.¹⁹ This provision codifies

¹⁷ "Sec. 1604.9 *Fringe benefits*

* * *

"(d) It shall be an unlawful employment practice for an employer * * * to make available benefits for the wives of male employees which are not made available for female employees; * * * An example of such an unlawful employment practice is a situation in which wives of male employees receive maternity benefits while female employees receive no such benefits.

"(e) It shall not be a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other."

¹⁸ "Sec. 1604.10 *Employment policies relating to pregnancy and childbirth.*

"(a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in prima facie violation of Title VII."

¹⁹ "Sec. 1604.10 *Employment policies relating to pregnancy and childbirth.*

* * *

"(c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity."

earlier EEOC holdings that an employee could not be discharged because of an absence occasioned by childbirth or a pregnancy-related disability but rather had to be given leave whether or not leave was provided for any other illness.²⁰ It is noted that, in taking this position, the EEOC recognized that the apparently sexually neutral policy of granting no leaves or only very short leaves has a disparate effect on female employees, in much the same way as a variety of facially neutral policies have been held to violate Title VII because in operation they reduced employment opportunities for racial or religious minorities. Closely analogous are employer practices with respect to Saturday work which have a disparate effect on those who observe their Sabbath on Saturday. The failure of the employer to make a reasonable accommodation violates Title VII. *Riley v. Bendix Corp.*, 464 F.2d 1113, 1116-1117 (5th Cir. 1972); *Reid v. Memphis Publishing Co.*, 468 F.2d 346 (6th Cir. 1972). Also analogous is the testing and high school diploma requirements which had a discriminatory

²⁰ See for example EEOC Decision No. 70-360, CCH-EEOC Decisions ¶ 6084 (December 16, 1970), where the charging party claimed that the employer discriminated against her because of race in refusing her maternity leave thus treating her as a quit when she was absent because of childbirth. The employer refuted the race discrimination charge by showing he had likewise denied maternity leave to Caucasian employees. The finding that the employer violated Title VII, quoted a November 15, 1966 opinion letter as follows: "The Commission policy with respect to pregnancy does not seek to compare an employer's treatment of illness or injury with his treatment of maternity, since maternity is a temporary disability unique to the female sex . . . Accordingly, we believe that to provide substantial equality of employment opportunity . . . there must be some special recognition for absences due to pregnancy, . . . for this reason, . . . a leave of absence should be granted for pregnancy whether or not it is granted for illness." In EEOC Dec. No. 71-308, CCH-EEOC Dec. ¶ 6170 (September 17, 1970) the EEOC stated that to refuse leaves for maternity "has a foreseeable adverse effect upon the terms and conditions of female employment, without any equivalent effect upon males." The EEOC's position is that even though males are never given such sick leave, as a man may lead the full life of a male and never miss work because of sickness, the absence of leave for disability has a disparate effect on females as they cannot lead the full life of a female without missing work because of childbirth.

effect on blacks and were therefore held by the Supreme Court in *Griggs* to be discriminatory within the meaning of Title VII.²¹

Fifth, all policies and practices with respect to leave, seniority, pensions, and health or temporary disability insurance must be applicable to absences occasioned by childbirth or other pregnancy-related disability on the same basis as to absences occasioned by other temporary disabilities.²² This codified the principles stated by the EEOC in a great variety of situations in which the failure to accord an employee absent because disabled by pregnancy or childbirth the same rights to accrue seniority, vacation pay and hospital, medical and disability benefits on the same basis as if the absence were for any other illness or accident was discriminatory within the meaning of Title VII. EEOC Decision No. 71-413, 3 FEP Cases 233, CCH-EEOC Dec. ¶ 6204 (November 5, 1970) restoration of seniority lost prior to enactment of Title VII; EEOC Dec. No. 71-1474, 3 FEP Cases 588, CCH-EEOC Dec. ¶ 6221 (March 19, 1971) sickness and accident benefits.

The EEOC guidelines are directed at the widespread practices of employers respecting pregnancy which have kept women at the bottom of the seniority lists and in the lowest paid jobs. In enacting the Equal Employment Opportunity Act of 1972, Congress pointed out that in the

²¹ *Griggs v. Duke Power Co.*, 401 U.S. 424 (1974).

²² "Sec. 1604.10 *Employment Policies relating to pregnancy and childbirth.*

* * *

"(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, and accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities."

years since the enactment of the Equal Pay Act, 29 USC 206(d), in 1963 and Title VII, 42 USC 2000e, in 1964, the median wage or salary income of fulltime year 'round female workers has fallen from 60% to 58.5% of that of comparable males.²³ The female worker has on the average a slightly higher number of years of education than the male,²⁴ with the work life of the single female 45 years as compared with 43 years for the male,²⁵ and a work life of 25 years on the average for all females.²⁶

Employer practices in terminating the employment of women upon pregnancy have been one of the major causes of the transiency of women in industry and it is this transiency upon which employers have historically justified the payment of lower wages to female employees.²⁷

Congress in its enactment of the 1972 amendments to Title VII also expressed its intent that the discriminatory practices with which it was concerned often manifested

²³ H. Rep. No. 92-238, 82nd Cong., 2d Sess., reprinted U.S. Cong. and Adm. News 1972, 2137, 2140 states: "Recent statistics released from the U.S. Dept. of Labor indicate that there exists a profound economic discrimination against women workers. Ten years ago, women made 60.8% of the average salaries made by men in the same year; in 1968 women's earnings still only represented 58.2% of the salaries made by men in that year. Similarly, in that same year, 60% of women, but only 20% of men earned less than \$5,000. At the other end of the scale, only 3% of women, but 28% of men had earnings of \$10,000 or more."

²⁴ U.S. Dept. of Labor, Women's Bureau, Bull. No. 294, 1969, Handbook on Women Workers, p. 178.

²⁵ Id., p. 7.

²⁶ U.S. Dept. of Labor, Women's Bureau, The Myth and the Reality, May 1974 (revised) p. 2.

²⁷ *General Electric Co.*, 28 War Lab. Rep. 666, 680-681, 685-686 (1945); *United Screw and Bolt Co.*, 17 War Lab. Rep. 232, 235 (1944); Hearings on H.R. 3861, 88th Cong., 1st Sess., Before the Special Subcommittee on Labor, 88th Cong., 1st Sess., pp. 139, 194, 243, 252, 258-259; Hearings on S. 882 and S. 910, 80th Cong., 1st Sess., Before the Senate Subcommittee on Labor of the Committee on Labor (Public Welfare) 88th Cong., 1st Sess., April 3, 1963, p. 142, 145; 109 Cong. Rec. 9205.

themselves in the form of patterns or systems of practices whose discriminatory character was to be detected by the expertise of the EEOC. Thus Congress stated (H. Rep. No. 92-238, 92nd Cong., 2d Sess., U.S. Cong. & Adm. News at 2144):

"Employment discrimination, as we know today, is a far more complex and pervasive phenomenon. Experts familiar with the subject generally describe the problem in terms of 'systems' and 'effects' rather than simply intentional wrongs. * * * The forms and incidents of discrimination which the Commission is required to treat are increasingly complex. Particularly to the untrained observer, their discriminatory nature may not appear obvious at first glance. * * *

"It is increasingly obvious that the entire area of employment discrimination is one whose resolution requires not only expert assistance, but also the technical perception that a problem exists in the first place, and that the system complained of is unlawful."

The guidelines represent a recognition by EEOC that employers have a wide variety of policies disfavoring women on the basis of pregnancy, that these policies are interrelated, and that they are part of a general pattern of discrimination based on sex. Obviously, an employer's bar to workers with the potential to become pregnant will serve to eliminate the vast majority of women from the workforce.²⁸ Similarly, if women are terminated whenever they become pregnant, they not only lose the job but also lose the opportunity to gain seniority and access to higher paying jobs in the future. Since many, if not most,

²⁸ In holding that South Central Bell Telephone had discriminated against the plaintiff because of her sex in refusing to consider her bid for the position of commercial representative the court stated (*Cheatwood v. South Central Bell Telephone*, 303 F.Supp. 754, 759-760, 2 FEP Cases 33, 36 (M.D. Ala. 1969)): "Title VII surely means that all women cannot be excluded from consideration because some of them may become pregnant." To the same effect see *Boyce v. Safeway Stores*, 351 F.Supp. 402, 5 FEP Cases 285, 286 (D.C. 1972).

female employees will become pregnant during their career, such a termination policy, as EEOC found, is sex discrimination in violation of Title VII.

The exclusion of pregnancy-related disabilities from disability programs is a similar means of sex discrimination. When one reviews the purposes of employers' disability plans, the invidiousness of the discrimination becomes apparent.

The most obvious purpose of a sickness and accident plan is to provide employees with insurance against financial problems during periods when they are disabled from working. That is the time when the loss of salary can be especially devastating, because disabled employees often incur increased expenses. They face heavy medical bills that may not be fully covered by health insurance, and payments for personal services they can no longer perform for themselves.²⁹

Moreover, plans such as AT&T's which condition the receipt of benefits on a physician's certification of disability, encourage employees to receive medical attention as soon as possible. Thus, a second purpose of sickness and accident plans is to minimize the severity of an employee's disability. A third is to foster higher employee morale, better worker-management relations and increased productivity.³⁰ This relationship between employees' well-being and employers' self-interest was recognized by Con-

²⁹ Congress recognized this purpose in the 1946 Amendments to the Railroad Unemployment Insurance Act, 45 U.S.C. 351(k)(2), which extended unemployment insurance payments to railroad workers who were unemployed because of disabilities. Officials of GE invoked the same purpose when they referred to the company's sickness and accident plan as a way of insuring employees "against the vicissitudes of life." J. Hammond, *Men and Volts, The Story of General Electric*, 383 (1941).

³⁰ National Industrial Conference Board, *Preparing for Collective Bargaining*, Studies in Personnel Policy, No. 172, 128 (1959).

gress.³¹ Employer spokesmen have repeatedly explained that these programs increase productivity because employees given insurance against sickness and accidents no longer have to worry about the future and hence are better workers, and more loyal to their employers.³² AT&T workers would be encouraged to remain with the company, and thus to reap the benefits of seniority and access to better jobs.³³

A fourth is to discourage an employer from sending an employee home or refusing to let the employee return to work when the employer might be of the view that the employee was not in the physical condition for top capacity production. If it costs the employer a substantial portion of the employee's usual wages to keep the worker at home, the employer will find less arduous work in the plant for the even partially disabled worker rather than have him or her at home drawing partial pay and producing nothing. See fn. 9, p. 3, *supra*.

³¹ The railroad workers' disability insurance was viewed as an aid in maintaining an employment relationship that would encourage employees' return to the employer upon recovery. Lester P. Schoene, representing the Committee of the Railway Labor Executives Association, Hearings on H.R. 1362 Before the House Committee on Interstate and Foreign Commerce, 79th Congress, 1st Sess. (Jan. 31, 1945) at 1112.

³² Donna Allen, *Fringe Benefits: Wages on Social Obligation*, Cornell Univ., Rev. 1969, pp. XIV-XV, 31, 33-36; *The Swope Plan*, by Gerard Swope, President, General Electric Co. (J. Frederick ed. 1931), at 44; D. Loth, *Swope of GE: The Story of Gerard Swope and General Electric in American Business*, at 153.

³³ The Prentice-Hall Survey of Maternity Leave Policies, Report Bulletin 25, vol. XIX, June 6, 1972, at p. 463 shows a high rate of return where employers have leave policies applicable to employees absent on account of childbirth:

"MOST OF THE WOMEN WHO TAKE MATERNITY LEAVES COME BACK TO WORK"

"We asked survey respondents to tell us what proportion of their employees who were pregnant in 1971 quit their jobs and what proportion took a leave. * * * [H]alf the plants, one-third of the office firms * * * said that 75% or more of the employees who were pregnant elected to take a leave. (In many of these cases, 100% of the employees took a leave). * * * [M]ore than half reported a perfect score on 'returns'—that is, all the employees who elected [to take] a leave actually returned to work as scheduled."

There can be no question that these purposes are as applicable to women workers who become disabled by pregnancy as they are to workers disabled by any other condition. When employers such as AT&T exclude a disability which many women employees will incur, while including every other type of disability possible, from cosmetic surgery to attempted suicide, they are not only denying women a benefit available to men, but are affirmatively and emphatically discouraging women from remaining with the company, thereby also reducing their access to seniority and advancement.

The EEOC in the first case to come before it, so far as our search of EEOC decisions discloses, which involved a plan for paying disability benefits for all disabilities, including voluntarily incurred disabilities, ruled that exclusion of pregnancy-related disabilities violated Title VII. The ruling pertained to a pre-1969 plan, Decision No. 71-1474, CCH EEOC Decisions ¶ 6221, at p. 4383 (March 19, 1971). There the EEOC stated:

"The old plan also provided that weekly benefits are not payable for disability due to pregnancy.³

"It is undisputed that other than pregnancy, all non-occupational disabilities were covered by the plan.⁴

"It is also undisputed that weekly payments are paid for a maximum of 13 weeks during any one continuous period of disability. We conclude that, as under the old plan, to deny female employees, who were physically disabled due to pregnancy, weekly benefits for 13 weeks was to discriminate because of sex within the meaning of Sec. 703(a) of the Act."

³ The Plan's Description of Benefits provides that 'weekly benefits are not payable for disability due to pregnancy.'

⁴ The record is unclear on whether the new plan provides for weekly benefits for disability due to pregnancy."

During 1971 EEOC made a careful study of the medical issues involved in employment of women before and after childbirth. It consulted Dr. Robert Henry Barter professor of gynecology at The George Washington University School of Medicine, and Dr. Andre E. Hellegers, professor of obstetrics-gynecology at Georgetown University, and utilized their services as expert witnesses in proceedings instituted by EEOC before the Federal Communications Commission against AT&T. Before so testifying, Dr. Hellegers had cooperated with EEOC in preparing key words to be placed in the Medlars Computer retrieval system at the National Institute of Health for the purpose of locating and studying all the medical literature relevant to the issue.³⁴

The medical literature retrieved by the Medlars Computer was uniformly to the effect that pregnancy per se without complications does not disable an employee from continuing to perform the same job as she was accustomed to performing when she became pregnant. Not only is it medically established that there is no deterioration in a pregnant woman's mental and physical capacity by reason of pregnancy, but several recent studies indicate it is in fact enhanced. Studies of comparative exercise efficiency of pregnant and non-pregnant women showed that pregnant women between the 24th and 35th weeks of pregnancy have a greater exercise efficiency than non-pregnant women or women during the earlier months of pregnancy.

Joseph Seitchik, Body Composition and Energy Expenditure During Rest and Work in Pregnancy, *American Journal of Obstetrics and Gynecology*, Vol. 57, page 701, March 1, 1967 describes an exercise study of 195 women, divided between 133 pregnant women, 34 non-pregnant women and 28 postpartum women. He used a stationary

³⁴ Information furnished to counsel for the IUE by David Copus, Attorney, EEOC, who worked with Dr. Hellegers in arranging for the project at NIH.

bicycle ergometer.³⁵ His conclusions were stated as follows (at p. 709):

Our pregnant women did not pay a greater price for the performance of this specific quantity of work. They appear to be at least as efficient as non-pregnant women, and are most efficient between 24 and 35 weeks. In retrospect, this result is not surprising. The period of maximum exercise efficiency occurs during that time when the cardiac output and blood volume are reaching their maxima. Pregnancy produces no alterations in the ability to ventilate. Therefore, the cardiovascular and respiratory set of the pregnant woman should not produce any limitation of exercise tolerance.

In a comment accompanying the publication of the article, Dr. Edward C. Hughes of Syracuse states (at p. 710):

The interesting finding that pregnant women are more efficient in carrying work loads during the twenty-fourth to thirty-fifth weeks of pregnancy brings up several possible explanations. It is possible that between the twenty-fourth and thirty-fifth weeks of pregnancy the body activity is at its maximum efficiency. Certain physiological events seem to point in this direction.

1. Cardiac output begins to rise at about the tenth week, reaches a peak action between the twenty-fifth and thirtieth weeks, and gradually declines to near normal at term. The maximum reported values average between 30 and 40 percent above the non-pregnant level, the increased output probably being due to increased cardiac volume.

³⁵ Of interest in this connection, as showing that these tests do not represent mere medical experiments removed from real life, is the story carried in the *Washington Star-News* October 31, 1973, p. A-1, bottom of the page, entitled "Bikes Whip Autos in Downtown Race" which reported a race sponsored by the Washington Area Bicyclists Assoc., The Metropolitan Coalition for Clean Air and the Emergency Committee on Transportation Crisis. Of ten bicycles racing autos from suburban to downtown Washington during morning rush hour traffic, nine bicycles won the race, the tenth bicycle tied, and one of the winning bicyclists was a woman six months' pregnant who outraced her husband, driving the car, by four minutes.

2. The blood volume reaches 20 to 30 percent above the normal from the twenty-fifth to thirty-fourth week of pregnancy with increments in both the plasma volume and red cell mass. This is followed by a decline during the last 4 to 6 weeks of pregnancy although the term values still are definitely higher than the normal. The hypothesis that placental function with increased hormone-steroid production may have an effect upon these activities, affecting cardiac output and the general metabolic activity, has been proposed by others.

Michael Bruser, *Sporting Activities During Pregnancy*, *Journal of Obstetrics and Gynecology*, Vol. 32, p. 72 (Nov. 1968), summarizes his conclusions respecting this study as follows:

A recent report of certain exercise tests done in 34 non-pregnant, 133 pregnant, and 28 recently-pregnant women offered the following conclusions:

1. Pregnancy produces no alteration in the ability to ventilate.
2. The period of maximum exercise efficiency occurs during the time when cardiac output and blood volume reach their maximums.
3. Measurements of exercise efficiency show that pregnant women are as efficient as non-pregnant women (except that women who were 24-35 weeks' pregnant were even more efficient).
4. There should be no limitation of exercise on any presently identifiable physiologic grounds until very late in pregnancy, when many of the physiological alterations of pregnancy, such as cardiac output, revert to non-pregnant levels.

The above cited article on sporting activities contains numerous interesting facts respecting the placement of pregnant women in Olympic sporting events, including the fact that of 25 female Soviet Olympic champions of the

XVI Olympiad in Milbourne, ten were pregnant (at p. 723). Bruser also states that (at p. 722):

In 1961, a report from a German sports school stated that the physicians there had learned to allow all sports during pregnancy except those accompanied by "bumping and compression." They also stated that the athlete has a better labor — i.e., easier and with fewer complications.

Another study confirmed the increased cardiac output in pregnancy but found that "the hyperkinetic state of pregnancy . . . is sustained up to the time of delivery." C. A. Guzman and R. Cajean, *Cardiorespiratory Response to Exercise During Pregnancy, American Journal of Obstetrics and Gynecology*, October 15, 1970, pp. 600, 605.

The illogical character of employer insistence on mandatory leave applicable to the last half rather than the first half of pregnancy is commented upon in William J. Dignam, *Work Limitations of the Pregnant Employee, Journal of Occupational Medicine*, Vol. IV, 1962, p. 423 at p. 424:

Many institutions have an arbitrary policy with respect to how long pregnant women may work, but I doubt that these policies are logical from a medical point of view. In general a woman is no less efficient, and perhaps more so, in late pregnancy than in early pregnancy.

The EEOC thus had before it all the best available medical data when it issued its Guidelines on Discrimination Because of Sex, 29 CFR 1604.10, April 2, 1972.

II

Congress intended to prohibit all discrimination in employment because of pregnancy when it enacted the prohibition on discrimination in employment because of sex in Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e

That Congress, by banning discrimination because of sex intended to and did require employers to make as full an accommodation to woman's childbearing function as business necessity would permit, is demonstrated by the Congressional admonition that non-discrimination because of religion required an accommodation to the religious needs of employees. When the courts held that an employer did not discriminate within the meaning of Title VII by refusing to accommodate, the Senate unanimously and the house overwhelmingly amended Title VII to add a new Section 701(j), 42 U.S.C. 2000e-(j), requiring accommodation. The legislative history of the amendment showed Congress had from the outset intended the concept of non-discrimination to include the obligation of accommodation and the courts have given retroactive application to the clarifying amendment, *Riley v. Bendix Corp.*, 464 F.2d 1113, 1116-1117 (5th Cir. 1972), citing and quoting at length the applicable legislative history; *Reid v. Memphis Publishing Co.*, 468 F.2d 346 (6th Cir., 1972); *Shaffield v. Northrop Aircraft Services*, 7 FEP Cases 465 (M.D. Ala. 1973).

The intent of Congress that non-discrimination because of sex requires an analogous accommodation is evident from the overwhelming vote to include sex which occurred after Congressman Cellar and Congresswoman Green opposed the amendment inserting sex, basing their objection on the fact that women were biologically different. 110 Cong. Rec. 2577-2584. The Congressional vote cannot reasonably be construed to mean that Congress rejected the fact of women's biological difference. Rather, Congress was manifesting its intent that non-discrimination requires accommodation to those biological differences. As Judge

Merhige stated "If Title VII intends to sexually equalize employment opportunity" then industry must shape its employment practices to meet the biological needs of its female employees in order to provide "such sexual equality as is within its power to produce." *Gilbert v. General Electric Co.*, 375 F.Supp. 367, 383 (E.D. Va. 1974)

It was so obvious that discrimination in employment because of pregnancy necessarily constitutes discrimination because of sex, that prior to the decision in *Geduldig*, every judge who had considered a pregnancy issue in a Title VII case had so ruled.

With respect to the issue of whether the failure of an employer to afford to employees unable to work because disabled by childbirth or a complication of pregnancy the same income maintenance as is provided in the instances of other disabilities, violates Title VII, six federal district courts and the Supreme Judicial Court of Massachusetts have held that such failure was a violation. *Gilbert v. General Electric Co.*, 375 F.Supp 367 (E.D. Va. 1974) now pending an appeal to the Fourth Circuit, Case No. 74-1557; *Wetzel v. Liberty Mutual Insurance Co.*, 375 F.Supp 1146 (W.D. Pa. 1974), now pending on appeal in the Third Circuit, Case No. 74-1233; *Farkas v. South Western City School District*, 8 FEP Cases 288 (USDCSDOh.ED, No. C2-73-169, Judge Carl B. Rubin, April 8, 1974); *Lillo v. Plymouth Board of Education*, 8 FEP Cases 21 (USDCNDOh.ED, Chief Frank J. Battisti, October 3, 1973); *Dessenberg v. American Metal Forming Co.*, 8 FEP Cases 290 (USDCNDOh. ED, Civil Action No. C-72-48T, decided by Judge William J. Young, October 3, 1973); *Hutchison v. Lake Oswego School District*, 374 F.Supp 1056, 8 FEP 276 (USDC D. Ore. 1974); *Black v. School Committee of Malden*, 8 FEP Cases 132, 138 (Mass. Sup. Jud. Ct. 1974) See also *Scott v. Opelika City Schools*, 63 FRD 144, 7 EPD ¶9375 (USDCMDAla.ED, May 6, 1974) where Chief Judge Frank M. Johnson, Jr. stated:

"If this case were being litigated under Title VII, defendant's maternity leave treatment would be unable to stand. Given defendant's failure to offer any rational justification for its policy, this result is equally called for under Section 1983." (footnote omitted)

Newmon v. Delta Airlines, Inc., 374 F.Supp. 238, 7 FEP Cases 26 (USDCNDGa. 1973), no matter how its holding on disability benefits is read, squarely held that discrimination because of pregnancy constituted discrimination because of sex. The court ruled that the requirement that pregnant ground employees go on leave at the end of the fifth month of pregnancy violated Title VII. This conduct was only discrimination because of sex if discrimination because of pregnancy constitutes discrimination because of sex. And the court characterized it as discrimination because of sex for it stated 374 F.Supp. at 247);

"In summary, the policy of the defendant as it existed in 1970 requiring female ground employees to take maternity leave at the end of the fifth month of pregnancy, without giving consideration to the individual abilities of such employees to continue working amounts to discrimination based upon sex and is violative of Section 703 of the Civil Rights Act of 1964."

To the same effect, see *Vick v. Texas Employment Commission*, 6 FEP Cases 411, 413 (U.S.D.C.S.D.Tex. 1973); *Singer v. Mahoning County Board of Mental Retardation*, 8 FEP Cases 489 (N.D. Oh 1974)

Discharge of an unmarried pregnant woman has been held sex discrimination in violation of Title VII, *Doe v. Osteopathic Hospital*, 334 F.Supp. 1357, 3 FEP Cases 1128 U.S.D.C. D.Kan. 1971) In so holding the court stated (3 FEP Cases at 1132)

Plaintiff's discharge on May 6, 1970 was an unlawful discrimination, on the basis of sex, in violation of the provisions of 42 U.S.C.A. 2000e-2, in that, she was dismissed because of unwed pregnancy, a condition peculiar to the female physiology."

From the beginning of operations the EEOC has uniformly held that discrimination because of pregnancy is discrimination because of sex in violation of Title VII. In 1966 the EEOC determined that because pregnancy is a special disability unique to the female sex, adverse treatment of pregnant women is discrimination based on sex.

In its annual reports to Congress, EEOC has regularly kept Congress informed of its holdings that discrimination because of pregnancy is discrimination because of sex in violation of Title VII. See quotation from First Annual Report at pp. 9-10, *supra*. In its Fifth Annual Report, for the year ended June 30, 1970, the EEOC reported (at p. 14):

"In other areas of sex discrimination the Commission has repeated its position that, since pregnancy is a temporary disability unique to the female sex, '... to provide substantial equality of employment opportunity . . . a leave of absence should be granted for pregnancy whether or not it is granted for illness.' (No. 70-360)."

In its Sixth Annual Report for the year ended June 30, 1971, the EEOC reported not only the policy respecting discrimination in the payment of sickness and accident benefits which it set forth in Decision No. 71-1474, decided March 19, 1971, more than a year prior to the Guidelines on Discrimination Because of Sex, 29 U.S.C. 1604.10, which are here involved, but a wide variety of instances in which the EEOC had found discrimination because of pregnancy. Thus in its Sixth Annual Report the EEOC reported to Congress (at pp. 11-12):

"Another aspect of sex discrimination frequently confronted by the Commission concerns maternity leave and benefits. The Commission has reaffirmed its position that a female employee who is compelled to cease work because of pregnancy must be offered a leave-of-absence, rather than discharge, 'except where the position cannot be left vacant or filled on a temporary basis during the employee's anticipated absence.' (E.g., No. 71-110). In situations where guaranteed re-

instatement after pregnancy is not possible because of business necessity, the Commission held that the employer must place charging party on a 'preferred recall list' rather than discharge her. (No. 71-2309)

"When an employer required a minimum length of service (two years) before married females were deemed eligible for maternity leave and benefits, but required no minimum service for leaves of absence or disability leave, the Commission held the policy to be unlawful since the employer failed to show that 'legitimate business considerations require that it condition maternity leave upon [length of service.]' No. 71-562 The Commission also found that the employer's limitation of maternity leave to 'married' females was discrimination because of sex and not a distinction 'rooted in morality' as claimed by the employer.

"The Commission stated that '[I]t is clear that the consequences of pregnancy for an unmarried female employee would be termination,' even though no 'provision has been made for the termination of unmarried father.' Accordingly, '... the limitation of maternity leave to married females discriminates against ... female employees because of their sex...' (*Id.*)

"An employer's refusal to hire a female with illegitimate children was found unlawful, even in the absence of evidence that it hired males with illegitimate children, since the policy had a foreseeably disproportionate impact on females and was not justified by business necessity. The Commission noted that 'bearing a child out of wedlock is a fact not easily hidden from an employer's discovery procedures, whereas it's a wise employer indeed that knows which of its male applicants truthfully answered its illegitimacy inquiry.' (No. 71-332)

"The Commission has also found violations where males received \$35.00 per week disability benefits and females received only \$25.00 per week and received no such benefits for pregnancy. (No. 71-1474)"

Any other construction of Title VII would open wide the door to discrimination because of sex. All pregnant women could be fired the minute their pregnancy became known.

They would be deprived of seniority, pension, hospitalization, medical benefits, etc. Clearly, Congress intended to and has made such discrimination unlawful.

The decision in *Geduldig v. Aiello*, 94 S.Ct. 2485 (1974) is thus not in point. It did not deal with employer practices respecting its female employees. *Geduldig* was concerned with the intent of a state legislature. The Supreme Court held that effect must be given to the intent of California with respect to priorities in administering a system of state paid benefits. The holding that the state's rank of priorities did not violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution has no relevance to the determination of the intent of Congress.

The Court in *Geduldig* made no mention of Title VII. Congress has uniformly been understood by EEOC as having intended by Title VII to prohibit discrimination because of pregnancy. The EEOC decisions in this regard have been given a great deal of publicity, as well as annually reported to Congress in the official annual reports which Congress has directed EEOC to file for the express purpose of keeping Congress informed of the manner in which the EEOC has interpreted and applied Title VII.

Accordingly, Title VII represents the mandate of Congress that the ban on discrimination because of sex encompasses a ban on discrimination because of pregnancy.

III

Congress intended to prohibit discrimination in employment against females by failing to pay them disability pay during absences due to childbirth or complications of pregnancy when males receive disability pay for all disabling conditions

The same Congress which enacted Title VII, in connection with its enactment of the Equal Pay Act, 29 USC 206(d), considered and rejected the contention that since women allegedly cost more than males with respect to health

benefits, absenteeism and turnover, the payment of sickness and accident benefits for pregnancy in fact created an inequality in favor of females rather than an equalization.

Opponents of the bill which became the Equal Pay Act put on a concerted drive to secure the reporting out of committee of the Martin bill (H.R. 1936, 88th Cong.) and when unsuccessful in that regard to secure adoption of an amendment introduced on the floor of the House by Congressman Findley of Illinois³⁶ each of which would have enabled employers who paid sickness and accident benefits to women disabled by pregnancy or hospital and medical expenses connected with maternity or had other special costs attributable to the employment of females to deduct these additional costs from wages so that the law would not require them to pay both the added cost of maternity benefits and equal pay.

The Congressional hearings on the subject of discrimination in employment because of sex were filled with the pleas and statistics of employers in support of their contention that women, from an economic point of view, must be paid lower wages because of the costs of industry arising from women's childbearing function, the cost to industry of maintaining her income during periods of absence for childbirth, and the lower worth of women because of their long absences and turnover due to childbirth. Illustrative is the following excerpt from the testimony of Jerry Markham, Thatcher Glass Co.:³⁷

"Mr. Markham. * * * You say, 'Why are you paying the female \$1.75 and the male \$1.95?' We point out to you that female experience over the years has cost us 20 to 23 cents an hour to maintain them as a part of our work force due to experience in employment, maternity, facilities.

³⁶ 109 Cong. Rec. 9205.

³⁷ Hearings on H.R. 3861 and related bills before the Special Subcom. on Labor of the House Com. on Education and Labor, 88th Cong., 1st Sess., Mar. 27, 1963, pp. 258-9.

"Mr. Thompson. Is this not why you pay them 20 cents an hour less?

"Mr. Markham. Yes, sir."

Mr. Markham specified the cost of his company of disability benefits upon which it relied in paying females lower wages.³⁸

"To illustrate the cost in question, we selected two of our glass container manufacturing plants and made an analysis of some of the additional costs of having women as part of our work force for a 2-year period, 1960-61. The following is the result of our study

	Per Hour	Per Year
"1. Absenteeism—Females were absent an average of 20 days more than male employees per year. The average yearly cost for excessive female absenteeism compared to males was	\$0.074	\$75,000
"This is excessive cost for excessive absenteeism as compared to male absenteeism for this 2-year period.		
"2. Turnover—Female turnover was more than twice (2.25-1) that of the male resulting in an additional excessive cost per year of	0.02	20,000
"3. Insurance—Based on figures submitted by our insurance carrier, the excessive cost per year of insurance covering female employees for maternity benefits is 11.49 per employee, equal to	.005	5,000

"That using only the maternal part of our whole insurance program as applied to females our costs were half a cent more or \$5,000 a year."

³⁸ Hearings on H.R. 3861, *supra*, at p. 243.

The general practice of industry at that time of relying on the cost of sickness and accident coverage for pregnancy-related disabilities as one of the increased costs incurred by employing women which justified paying them lower wages is documented in the hearings on bills for equal pay which took place periodically from 1945 to 1963.³⁹ The prevailing wage structure in the United States was based on the theory women would have to be paid sickness and accident benefits during maternity leave and hence should be paid lower hourly rates. See the following testimony of W. Boyd Owen, Vice President of Personnel of Owens-Illinois Glass Co.⁴⁰

*"[T]he cost of providing disability benefits for female employees is reported to be approximately 150 percent of the cost of providing the same benefits for male employees when maternity benefits are excluded or 200 percent when maternity benefits are included. * * ** For a typical package plan of medical care benefits, however, the female cost is reportedly about 130 percent of the male cost. This does not include a plan that allows benefits for pregnancy. Since the typical group plan does include benefits for pregnancy, a ratio of 165 percent or even 170 percent would be appropriate." Emphasis supplied.

The statement of Mr. Owen that the typical disability benefit plan included the payment of such benefits in connection with pregnancy was accurate. Both in 1963 and today the majority of women covered by such plans receive at least six weeks of coverage in connection with a normal pregnancy often accompanied by the same maximum coverage for a complication of pregnancy as for any other disability. The Society of Actuaries, Transactions 1972, No. 2, June 1972, pp. 190-202 shows a coverage for at least six weeks in connection with childbirth or a complication

³⁹ Bills for equal pay were first introduced in Congress in 1945 (S. 779, 1178, 79th Cong.), reintroduced in 1947 (H.R. 1584, 2483, 81st Cong.), 1962 (S. 1502, 2494, H.R. 11677, 87th Cong.) and 1963 (S. 1552, H.R. 298, 88th Cong.) and finally the Equal Pay Act (29 U.S.C. 206(d)) was enacted in 1963.

⁴⁰ Hearings on S. 882 & S. 910 Before the Senate Subcom. on Labor & Public Welfare. 88th Cong. 1st Sess. April 3, 1963, p. 142. See also other witnesses whose testimony is cited fn. 27, p. 14, *supra*.

of pregnancy of 60% of the women covered by temporary disability benefits plans. As the court found in *Gilbert v. General Electric*, 375 F.Supp. at 376-377, about 95% of pregnancies are disabling for only six to eight weeks.

The meat packing companies, Armour and Swift, and related food industries, Campbell Soup for instance, pay for a maximum of 8 weeks for disabilities due to pregnancy. The auto industry, steel and related can industry and part of the electrical industry pay up to a maximum of 6 weeks.⁴¹

⁴¹ For many years the U.S. Department of Labor, Bureau of Labor Statistics, had issued periodically a "Digest of Health and Insurance Plans." The 1971 edition (GPO 1972), Vol. II, lists on the page indicated the following plans as paying temporary disability benefits for disabilities arising out of pregnancy: Aluminum Co. of America, 6 weeks, p. 1; American Can Co., 6 weeks, p. 7; American Seating Co., 6 weeks, p. 9; American Standard, Inc., 6 weeks, p. 11; Amstar Corp., 6 weeks, p. 15; Armour & Co., 8 weeks, p. 17; Armstrong Cork Co., 6 weeks, p. 19; Bethlehem Steel, 6 weeks, p. 21; Borden, Inc., 6 weeks, p. 23; Brewers Board of Trade, 26 weeks, p. 25; Campbell Soup Co., 8 weeks, p. 31; Caterpillar Tractor Co., 6 weeks, p. 35; Chase Brass & Copper Co., Inc., 6 weeks, p. 41; Cluett, Peabody & Co., Inc., 6 weeks, p. 49; Cone Mills, 6 weeks, p. 53; Construction Ind., Painter's District Council 9, 13 weeks, p. 61; Continental Can Co., 6 weeks, p. 63; Crown Zellerbach, 6 weeks, p. 67; Deere & Co., 6 weeks, p. 69; Distillery Industry, 6 weeks, p. 73; Dow Chemical, 6 weeks, p. 79; Retail Drug Industry and Hospitals, 6 weeks, p. 83; E.I. duPont de Nemours, 6 weeks, p. 85; Firestone Tire and Rubber Co., 6 weeks, p. 87; FMC Corp., 6 weeks, p. 93; Ford Motor Co., 6 weeks, p. 97; Furniture Industry, 6 weeks, p. 101; General Motors, 6 weeks, p. 111; B.F. Goodrich Co., 6 weeks, p. 117; Greyhound Corp., 6 weeks, p. 122; Hotel Assn. of N.Y.C., 6 weeks, p. 125; Interco Inc., The Florsheim Shoe Co., 6 weeks, p. 135; Int'l Harvester Co., 6 weeks, p. 141; Int'l Paper Co., 6 weeks, p. 147; Jewelery Manufacturers Assn., 6 weeks, p. 151; Johnson & Johnson, 8 weeks, p. 153; Kennecott Copper, 6 weeks, p. 155; LTV Aerospace Corp., 6 weeks, p. 167; Luggage & Leather Goods Industry, 6 weeks, p. 171; Maritime Ind., 6 weeks, p. 177; Mass. Leather Mfrs. Assn., 6 weeks, p. 181; Metalworking and Repair Services, 6 weeks, p. 187; Nabisco, Inc., 6 weeks, p. 201; Nat'l Auto Transporters Assn., 6 weeks, p. 203; Nat'l Steel Corp., 6 weeks, p. 205; N.Y. Shipping Assoc., Inc., 6 weeks, p. 207; North American Rockwell Corp., 6 weeks, p. 211; Northwest Forest Products Assn., 6 weeks, p. 215; Owens-Illinois, 6 weeks, p. 217; Pacific Maritime Assn., 6 weeks, p. 221; Philip Morris, Inc., 6 weeks, p. 233; Printing Industry-Lithographers, 6 weeks, p. 239; Pullman Inc., 6 weeks, p. 245; RCA, 8 weeks, p. 251; Retail Trade Industry, 20 weeks, p. 257; Retail, Wholesale & Warehouse Industries, 6 weeks, p. 247; Sperry-Rand, 6 weeks, p. 265;

The Findley amendment was voted down on the floor of Congress.⁴² The hearings and debates on the Equal Pay Act properly constitute part of the legislative history of Title VII.⁴³

The rejection by Congress of the Findley amendment shows that Congress did not agree with the contention of its sponsors that to pay pregnant women sickness and accident benefits in addition to equal pay would create an inequality in favor of women. Rather this legislative history supports the interpretation of Title VII which has been adopted by EEOC, that equality for the sexes in the field of employment requires the payment of the same disability benefits to women disabled by pregnancy as are paid in connection with other disabilities.

Swift & Co., 8 weeks, p. 277; Trucking Industry, 6 weeks, p. 23; TRW Inc., 6 weeks, p. 275; Uniroyal, Inc., 6 weeks, p. 291; United Air Lines, Inc., 6 weeks, p. 293; U.S. Steel Corp., 6 weeks, p. 297; Upholstering & Allied Trades Industries, 6 weeks, p. 303; Westvaco Corp., 6 weeks, p. 307; Wyandotte Worsted Co., 6 weeks, p. 311.

⁴² 109 Cong. Rec. 9217.

⁴³ See Bessie Margolin, *Equal Pay and Equal Opportunities for Women*, N.Y.U., 19th Conference on Labor, pp. 297, 301-302, 306:

"The most illuminating measure of the significance of both the Equal Pay Act and the 'sex' amendment of Title VII is this common legislative history and background. This requires particular emphasis because the mistaken idea has been circulating that, in contrast to race, color and creed discrimination, there is little or no legislative intent or objectives of the 'sex' amendment to Title VII. Anyone who asserts that the case against sex discrimination has not been documented prior to the inclusion of sex discrimination in Title VII, or that 'the legislative history was virtually blank' and 'the intent and reach of the amendment were shrouded in doubt' has manifestly overlooked and the overwhelmingly impressive documentation presented at the hearings on the Equal Pay bills. This documentation is certainly no less thorough and convincing than the documentation of discrimination against the Negro.

"The chronology of the enactment of the Equal Pay Act and the Civil Rights Act, and the extensively documented facts and statistics emphasized at the hearings and in the debates on the Equal Pay bills can leave no doubt, I submit, of the direct relevance of this legislative history to the 'sex' amendment of Title VII of the Civil Rights Act. * * * Commissioner Graham in his speech to the Personnel Conference of the American Management Association of February 9, 1966, * * * made clear that the Commission is quite aware of the impressive legislative background underlying the Equal Pay Act and its manifest pertinence to the 'sex' amendment of Title VII."

CONCLUSION

For the foregoing reasons we urge that the judgment below should be reversed.

Respectfully submitted,

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October 30, 1974

IN THE
UNITED STATES COURT OF APPEALS
For the Second Circuit

No. 74-2191

Communication Workers of America, AFL-CIO, et al., Appellants,

v.

American Telephone and Telegraph Company, Long Lines Department, Appellee.

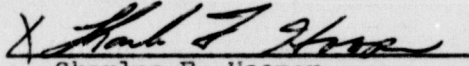
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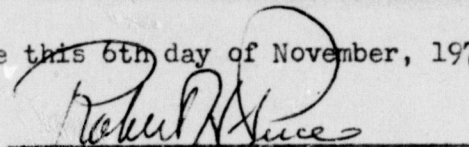
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SUBSCRIBED AND SWORN TO before me this 6th day of November, 1974.


Notary Public, D. C.

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